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THE IMPLICATION OF THE HATE SPEECH LAW ON FREEDOM EXPRESSION IN ETHIOPIA

Degsew Tadesse

Supervisor: Mesenbet Assefa (PhD)

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**The Implication of the Hate Speech Law on Freedom of
Expression in Ethiopia**

By: Degsew Tadesse

Approved by Board of Examiners

Advisor: Dr. Mesenbet Assefa

Signature

Examiners:

1. _____

Signature

2. _____

Signature

Declaration

I, the undersigned, hereby declare that this thesis is original and the result of my own work and has never been submitted to any other institution, I also declare that any material used in this thesis have been duly acknowledged.

DEGSEW TADESSE

Date: October 2021

Signature: _____

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CBC	Ethiopia Broadcast Corporation
COE	Council of Europe
CPPCG	Convention on the Prevention and Punishment of Crime of Genocide
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EHRC	Ethiopian Human Rights Commission
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICTR	International Criminal Tribunal for Rwanda
RPA	Rabat Plan of Action
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

Table of Contents

Abbreviations	v
ABSTRACT	viii
CHAPTER ONE	1
INTRODUCTION	1
1.1 Background of the study	1
1.2 Statement of the Problem	3
1.3 Research Questions	5
1.4 Methodology	5
1.5 Literature Review	5
1.6 Scope and Limitations	7
1.7 Objective of the Study	7
1.8 Structure of the Study	8
CHAPTER TWO	9
Theoretical and Conceptual Framework of Freedom of Expression and Hate Speech	9
2.1 Theories on Freedom of Expression	9
2.1.1 Search for Truth	9
2.1.2 The Democracy Theory	10
2.1.3 Autonomy	10
2.2 International and Regional Human Rights Norms on Freedom of Expression	11
2.2.1 Universal Declaration of Human Right (UDHR)	11
2.2.3 The Right to Freedom of Expression under the African Human Right system	13
2.3 Restrictions on the Right to Freedom of Expression	14
2.3.1 Provided by Law	14
2.3.2 Legitimate Aim	15
2.3.3 Necessity and Proportional	16
2.4 Conceptual Framework of Hate Speech	18
2.4.1 Definition and Background	18
2.4.2 Legal Developments on Hate Speech	20
2.5 Types of Hate Speech	23

2.5.1	Hate Speech that must be prohibited	23
2.5.2	Hate speech that may be prohibited	24
2.5.3	Lawful hate speech	24
2.6.1	Intent	25
2.6.3	Prohibited Results	26
CHAPTER THREE		27
THE IMPLICATION OF THE HATE SPEECH LAW ON FREEDOM OF EXPRESSION IN ETHIOPIA		27
3.1	Introductory Overview	27
3.2	The Right to Freedom of Expression and Its Restrictions under the FDRE Constitution .	29
3.3	The Implication of the Hate Speech Law on Social media Usage in Ethiopia	32
3.4	Compatibility of Ethiopian Hate Speech Law with International Laws Applying on Freedom of Expression	35
3.4.1	Vague and Unclear Definitions of Hate Speech	35
3.4.2	Disproportionate Criminal Punishments	37
3.4.3	Problematic Delegated Censorship Obligations to Social-Media Service Providers ..	39
3.4.4	Misapplication of Relevant Standards on Limitations	40
CHAPTER FOUR		42
CONCLUSION AND RECOMMENDATIONS		42
4.1	Conclusion	42
4.2	Recommendations	44
Bibliography		46

ABSTRACT

Freedom of expression is an important right protected under international and regional human right laws. Ethiopia also recognized the right to freedom of expression by ratifying the International Covenant on Civil and Political Rights (ICCPR) in 1993. It also recognizes the right to freedom of expression under its constitution of 1995. However, these international human rights instruments do not only recognize the right to freedom of expression, but also actually require state parties to restrict certain speech on the ground that it undermines the right of others to equality and non-discrimination. Hate speech is top of these exceptional restrictions and it is become a problem of democratic values, peace, social-stability, displacement, crime against humanity and even Genocide. In order to tackle this problem the government of Ethiopia has adopted a hate speech law. However, this hate speech law, contain provisions that may adversely affect the enjoyment of the right to freedom of expression, including vague definition of 'hate speech', disproportionate criminal punishments and problematic censorship delegation of social-media service providers. This thesis is seek to assess the implication of this hate speech law on freedom of expression in Ethiopia, in light of international and regional human right laws.

CHAPTER ONE

INTRODUCTION

1.1 Background of the study

The right to freedom of expression is one of the pillars of democratic society and a key to the realization of other human rights.¹ It is an important right protected under the International and regional human right instruments. These instrument includes the Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples Right (ACHPR), European Convention on Human Right (ECHR) and the American Convention on Human Right(ACHR) ². It is also incorporated in the Constitution of most states.

In the history of Ethiopia, freedom of expression was legally recognized by the 1955 Revised Constitution of the imperial regime for the first time.³ This constitution states that ‘freedom of speech and of the press’ is protected in ‘accordance with the law’.⁴ After the overthrow the imperial regime, the 1987 Constitution of Peoples Democratic Republic of Ethiopia was issued by the military (Derg) regime. This constitution gave recognition to freedom of expression by clearly stating that all ‘Ethiopians’ have freedom of speech and press.

After the 'Derg' regime was removed from power, freedom of expression was again issued under article 1(a) of the 1991 Transitional Charter of Ethiopia. This Charter was followed by the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution which also recognizes the right under article 29. In addition, Ethiopia have become a party to different international and regional human rights instruments which have recognized freedom of expression as a fundamental human right i.e. ICCPR and ACHPR. These international and regional instruments are applicable in the country as per article 9(4) of the FDRE Constitution.

However, the right of freedom of expression under the international law is not an absolute right, rather it is a right which needs to be balanced with other competing interests. Thus, this right is not without limitations. Under international human law, limitations on freedom of expression

¹Wolfgang Benedek & Matthias Kettemann, *'Freedom of Expression and the internet'* (2013) p.23-44

² Universal Declaration art 19, ICCPR art 19, ECHR art 10, ACHR art 9 and ACHPR 13.

³Gedion Timothewos, Freedom of Expression in Ethiopia: The Jurisprudence Dearth, 4 Mizan L. Rev. 201(2010)

⁴ Revised Constitution of Ethiopia, Imperial Ethiopia (1955), Art 41

should fulfil at least three tests, (1) the restriction should be prescribed by law, (2) it must be to achieve a legitimate aim, (3) it should be necessary and proportionate.⁵ However, it should be noted that the application of such limitation needs a special care since it can be easily manipulated by states in order to dismantle dissent and to suppress critics.

The most recognized limitation on the right to freedom of expression under international human right laws are speeches, which incite violence, expressions, which are hateful, offensive and obscene, or any expression, which is legally prohibited.⁶ Hate speech is the top of these restrictions. Such restrictions are usually born out of the need to protect the right of others as well as the obligation of the state to preserve public peace, public morality and public order.⁷

Indeed, hate speech has the potential for inciting the commission of various forms of mass atrocities including, crimes against humanity and genocide.⁸ However, the term ‘hate speech’ is not clearly, define under international human right laws. The international community has made different attempts to define the term hate speech.

For instance, the United Nations Plan of Action on Hate Speech, defines the term hate speech as: “any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factor.”⁹ However, this definition has no binding effect, since it is a soft law.

The government of Ethiopia has also adopted a hate speech proclamation to prevent and suppress the spread of hate speech.¹⁰ Moreover, regulation of hate speech is significant in Ethiopia to maintain the peaceful co-existence of its federal ethnic arrangement, since the country has cultural, linguistic, religious and ethnic diversity.¹¹ Yet despite this articulation of a legitimate

⁵ UN HRC General Comment No. 34 ‘Article 19: Freedoms of opinion and expression’ paras 22

⁶Rahman Apalara, ‘*Striking a Balance: Freedom of Expression and the Prohibition of Hate Speech and Offensive Remarks*’ University of Logos, September 11, 2017

⁷ Ibid

⁸ Audrey Fina, ‘Defining Hate Speech: A seemingly Elusive Task’, *Journal of international Criminal Justice* V.18 (2020) p.31

⁹ United Nations Strategy and Plan of Action on Hate Speech, adopted by United Nations Secretary-General, May 2019. P.2

¹⁰ Article 2, of the Hate Speech and Disinformation Prevention and Suppression Proclamation, No.1185 /2020.” Fed.Neg. Gaz Year 1. No26 (2020)

¹¹ Mesenbet A.Tadeg, ‘*Making Space for Non-Liberal Constitutionalism in Free Speech: Lessons from a Comparative Study of the State of Free Speech in Ethiopia and Thailand*’(2016) p.7

aim, the proclamation may do little to address these societal problems instead serving to restrict freedom of expression, stifle the press and silencing dissent voices.¹²

And also the government of Ethiopia has been criticize for using discursive legal tools to silence political opponents, journalists, political activists, bloggers and individuals to maintain their political power.¹³ This study aim to scrutinize the implications of the new hate speech law on freedom of expression in Ethiopia.

1.2 Statement of the Problem

Under international human right law, the regulation of hate speech requires a reconciliation of two sets of values: democratic society's requirements which allow open debate and individual autonomy and development with the compelling obligation to prevent attacks on vulnerable communities, ensure the equal and non-discriminatory participation in public life.¹⁴

Moreover, striking an appropriate balance between protecting freedom of expression and regulation of hate speech remains a difficult task for both domestic and international policy and law makers. ¹⁵On this issue, the United Nations Secretary General clearly mentions that regulating hate speech does not mean limiting or prohibiting the right to freedom expression speech.

In addition there is no a single binding international human right law addressing the problem of hate speech, there exist fragmented provisions of human right law provisions everywhere. These includes art 4(a) of ICERD, 20(2) ICCPR and art 3(c) of the Genocide Convention, but these human right instruments are simply prohibit advocacy of hatred that constitute incitement to discrimination, hostility or violence.

For instance, the Convention on the Prevention and Punishment of the Crime of Genocide require States to prohibit 'a direct and public incitement to genocide'.¹⁶ Moreover, article 20(2) of ICCPR also prohibit advocacy of hatred that constitute incitement to discrimination, hostility

¹²Berhan Taye, 'Ethiopia's hate speech and disinformation law: the pros, the cons and mystery'(2020)www.accessnow.org (accessed on April 2021)

¹³ YE Ayalew 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal*p.328

¹⁴Frank La, The Report of Special Rapporteur on the right to freedom of opinion and Expression on hate speech, Rue (A/67/357).

¹⁵ Rahman (n 6 above)

¹⁶ The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN Treaty Series, vol. 78, p. 277, Article 3(c).

or violence.¹⁷Indeed, these international human right laws are not define what hate speech is; rather they simply prohibit special forms of incitements that may constitute hate speech, including incitement to genocide, incitement to hatred and hate propaganda, while these concepts are different but inter-related which may use to restrict a special forms of hate speech. Nevertheless, this study seeks to address these concepts as a hate speech because the term hate speech is a generic concept.

These international human right law provisions also exceptionally allow states to take legislative measures against the problem of hate speech, though this legislative measure is efficient and appropriate to prevent harm emanating from hate speech, the necessity of hate speech law in a democratic society is still controversial, since only open debates and free discussions are promoted.¹⁸

The government of Ethiopia has also enacted the hate speech law the so-called proclamation No.1185/2020 in order to control and suppress the dissemination of hate speech, however the government of Ethiopia has been criticized for using discursive legal tools to silence political opponents, journalists, activists, bloggers and individuals in order to maintain their political power.¹⁹ The repealed anti-terrorism law is a good example of this assertion.

The new Ethiopian hate speech law has also a potential of serving to restrict the right to freedom of expression, stifle the press and silencing dissent voices. Concerning this issue, the United Nations Special Rapporteur on the right to freedom of opinion and expression has expressed his concerns about the Ethiopian hate speech law, stating that the law goes far beyond the command of article 20(2) and limitations on restrictions required by article 19(3) of the ICCPR.²⁰

This may accelerate the fear that the law could be used to silence critics, a country which ethnicity defines the politics and government at national and regional level; it is possible that

¹⁷ ICCPR, Article 20(2)

¹⁸ Yohannes (n 13 above) 325

¹⁹ Hussein Tura, *'The Impact of the Ethiopian Anti-terrorism Law on the Right to Freedom of Expression'* Conference Paper, Vilnius University, Faculty of Law, Lithuania, 27-28 April 2017.

²⁰United Nations Special Rapporteur on the right to freedom of opinion and expression, David Kaye, Visit to Ethiopia, 2-9 December 2019

political debates could be penalized under the hate speech law.²¹ As such, the hate speech law has continuing to be one of major contesting issues, which can have negative impact on freedom of expression in Ethiopia.²² Indeed, this study aims to shed some light on the implication of this law on the right to freedom of expression in Ethiopia, from the perspective of international human rights law.

1.3 Research Questions

Main research question

This study attempt to assess the implication of the hate speech law on freedom of expression in Ethiopia by giving special emphasis on the following basic research questions.

1. What are the international human right law standards in relation to limitation of the right to freedom of expression?
2. Are the contents of Ethiopian hate speech law consistent with international standards in applying to limit the right to freedom of expression?
3. Are the obligations imposed on social media service providers legally enforceable and feasible?

1.4 Methodology

In answering the research questions, qualitative research methodology and doctrinal approach is adopted. Predominantly primary sources including, constitutions, statutory orders, case reports, rules and Proclamation are used, in addition, secondary sources including books, treaties, websites, Article of journals, dissertations and other scholarly writings are also used. Related with the issue, face to face interview with experts concerned based on their institutional mandate, knowledge and experience from Federal General Attorney and Ethiopian Broadcast Corporation is conducted.

1.5 Literature Review

Freedom of expression is a fundamental human right stipulated under article 19 of ICCPR. It also serves as an enabler of other rights. Barak, defined freedom of expression as ‘a freedom of a

²¹ Article 19, Ethiopian: Hate speech and Disinformation law must not be used to suppress criticism of the government, January 19, 2021

²² Yohannes (n 18 above)

person to make his opinion heard and hear the opinions of his fellow man without being obliged to do so.²³ Robert Martin also defines it as follows:²⁴

‘The freedom to receive and impart ideas, opinion and information without interference, hindrance or intimidation. It belongs to all persons and may be exercised through speaking, writing, publishing and broadcasting or through physical activity’.

Rhona Smith, also mentions the interdependence of freedom of expression with other rights and defines freedom of expression as ‘cornerstone of any democratic society.’²⁵

Similarly, Mesenbet also argue that, freedom of expression is a powerful means of addressing a deep rooted structural problem in a society like corruption and embezzlement.²⁶ O’Flaherty also supports this argument saying the right is vital for the functioning of the whole human rights system.²⁷ However, the right is not absolute; there is limitation on what individuals or the state may do, and the sacrifices it entails are in some cases significant.

Recently, any speech that advocates for national, racial or religious hatred which constitutes incitement to discrimination, hostility or violence shall be prohibited by law are challenging the exercise of the right in many countries including Ethiopia and the extent of the limitation on the right has been debatable.²⁸

Nowadays, hate speech has become a threat to peace, tolerance and democracy. However, it’s difficult to find the meaning of the term “hate speech” under international human right instruments. While, for the great depth of discussion about the harms of hate speech, how it is spread, the appropriate public and private responses to it understanding the meaning of the term “hate speech” is important.²⁹

Legislative regulation of hate speech is also a controversial task between and among different scholars .Olanrewaju argues that, hate speech has become a cause for mass violation of human rights, crimes against humanity or even genocide in contemporary human society; as such, it

²³ Aharon Barak, ‘Freedom of expression and its limitations’ (1990) 8 Keshet/רשק, n5e https://www.jstor.org/stable/23902900?seq=1#page_scan_tab_contents (accessed 28 June 2021).

²⁴ Robert Martin, ‘Promoting Freedom of Expression in the Commonwealth’ (2002) 524.

²⁵ Rhona KM Smith *Textbook on International Human Rights* (2007) 267.

²⁶ Mesenbet A Tadeg ‘Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges,’ (2016) *Journal of Media Law & Ethics* 1.

²⁷ Michael O’Flaherty ‘Freedom of Expression: article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34’ (2012) 12 *Human. Rights Law Review* 627.

²⁸ UN HRC Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression ‘Ten Key Challenges to Freedom of Expression in the Next Decade’ A/HRC/14/23/Add.2.

²⁹ Andrew F.Seller, ‘Defining Hate Speech’ <http://ssm.com/abstract> 2882244 (Accessed on July 2021)

should be regulated.³⁰ While, David, advocate ‘arguments for and against regulation of hate speech is, from the perspective of the right to freedom of expression, in part because the debate over hate speech seems to have liberation and egalitarian standards within the liberal democracy’³¹.

In infant democracies like Ethiopia, ensuring freedom of expression is very important as it reduces risks of violence and contributes to democratic development through public participation as long as it is not at the expense of other important rights.³² However, in reality, Ethiopia is listed as one of the most censored countries.

The hate speech law is also one of the controversial laws which is criticized for its ‘overly broad and vague’ definitions.³³ Some scholars argue that ‘though, the regulation of hate speech is significant in Ethiopia to maintain the peaceful co-existence of its federal ethnic arrangement.’³⁴ While, hate speech law has a continued to be one of major contentious issues, which can have negative implication on freedom of expression in Ethiopia.³⁵

1.6 Scope and Limitations

This study covers provisions of international and regional treaties on freedom of expression and Hate Speech, but its main focus is the case of Ethiopia. Though there are different international instruments dealing with freedom of expression and hate speech for the purpose of this study more attention is payed to the binding international and regional instruments. Besides the fact that Ethiopia is a civil law country coupled with inaccessibility of cases has made the researchers analysis highly focused on the legislations

1.7 Objective of the Study

The study aim to review and assess the implication of the hate speech law on freedom expression in Ethiopia. Second, it aim to scrutinize what the concept of hate speech in Ethiopia denotes in light of international human right laws applying on the right to freedom of expression. Third, it evaluate the compliance of the contents of the Ethiopian hate speech law with these international human right laws. Finally, it will suggest ways in which hate speech can be regulated and

³⁰ Olanrewaju O.P>Ajakaiye, ‘Hate speech and fake news: A study of meaning and perceptions in Nigerian political culture’, *international journal of scientific and engineering research*, volume 10, June 2019

³¹David O. Brink, ‘Millian Principles, Freedom of Expression, And Hate Speech’ *Legal Theory*, (2001), 119-157

³² Mesenbete (n 23 above) 15

³³ Yohannes (n 13 above) 225

³⁴ Ibid

³⁵ Ibid

limited in a compatible with the international human right laws applying on the right to freedom of expression.

1.8 Structure of the Study

Chapter one of this research introduces background of the research, the research methodology, literature review, limitations, objective and structure of the study. Chapter two is focused on laying down the theoretical and legal foundations of the right to freedom of expression and hate speech based on which the research has been presented. Chapter three assesses the implication of the hate speech law on freedom of expression and the problem of hate speech in Ethiopia. Chapter four provide conclusion and recommendation.

CHAPTER TWO

Theoretical and Conceptual Framework of Freedom of Expression and Hate Speech

2.1 Theories on Freedom of Expression

To understand the nature and scope of freedom of expression looking into its theoretical justifications will be helpful. Several theories have developed to justify the protection to freedom of expression.³⁶ However, for the purpose of this study the three well known theoretical justifications will be discuss.³⁷ Namely, the truth theory, the democratic theory, and the autonomy theory.

2.1.1 Search for Truth

John Stuart Mill advocates this theory³⁸; it is also called the truth theory. This theory bases itself on the desire of discovering the truth. Accordingly, freedom of expression is necessary to 'assure' humanity of the discovery of the truth.³⁹ This theory presents the 'harm principle' as the only exception to limit freedom of expression. This implies rights should not be limited except where it presents harm to others.

The theory states that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. However this theory is criticize for putting too much faith in the power of truth emerge from the open discussion, and for assuming that free expression of ideas and unrestricted discussion will inevitably lead to the discovery of truth.⁴⁰ The theory is also criticized for presuming individuals and society as rational, in a world where people can be easily misled by false propaganda.⁴¹

³⁶ Aharon Barak, *'Freedom of expression and its limitations'* (1990)

³⁷ Guy Carmi, 'Dignity, the enemy from within: a theoretical and comparative analysis of human dignity as a free speech justification' (2007) 9 *journal of constitutional law* 4 957.

³⁸ See generally John Stuart Mill *'On Liberty'* (1859) chapter II

³⁹ Ibid

⁴⁰ Thomas Scanlon, *'A theory of freedom of expression'* (1972) 1 *Philosophy & public affairs* 205-206.

⁴¹ Irene m. Ten, 'speech, truth, and freedom: an examination of John Stuart Mill's and Justice Oliver Wendell Holmes's free speech defenses,' 22(2010) *Yale journal of law and the humanities* 35.

2.1.2 The Democracy Theory

Democracy related with freedom of expression.⁴² Lincoln define democracy as the 'government of the people, by the people, for the people' where citizens are at the center of the political system'.⁴³ Democratic system, to function properly, an informed voting public is necessary and in order to have such kind of informed citizens, 'there must be no constraints on the free flow of information and ideas.'⁴⁴This assertion makes freedom of expression an integral part of a democratic system⁴⁵ for citizens to form their opinions and decisions concerning national agenda, they must be able to access various viewpoints and information.

Most importantly, freedom of expression facilitates the idea of sovereignty of the people, by empowering individuals to debate public issues, which supports the democratic process of election. ⁴⁶Generally, the theory considers freedom of expression as a vital condition for the functioning of democracy.⁴⁷However, democracy is perhaps one of the most influential theoretical justifications several criticisms have historically been aimed at the argument. One is that the argument is only useful in democracies, and it assumes that democracy is the most preferable form of government.⁴⁸ As a result, scholars like Ashutosh Bhagwat regard the argument from democracy theory as an 'artificial'.⁴⁹

2.1.3 Autonomy

According to this theory, 'individuals should be treated as rational and autonomous by allowing them all the information and advocacy that might be helpful to a rational, autonomous person making a choice'.⁵⁰ Scanlon is the main advocate of this theory.⁵¹ Recognizing individual autonomy is the focal point of this theory, which necessitates their choice to speak and receive

⁴² Eve Thomas, *Free Speech and Its Relation to Self-Government*. By Alexander Meiklejohn. New York: Harper & Brothers, 1948., 3 U. Miami L Rev.66 (1948), see also Robert Post, *Participatory Democracy and Free Speech*, 97 VA.L Rev 477, 482 (2011)

⁴³ Marlin Randal 'propaganda and the ethics of persuasion' (2002).26-27.

⁴⁴ Ibid

⁴⁵ Alexander Meiklejohn, 'Free Speech and Its Relation to Self-Government', (1948) New York: Harper Bros 26-27.

⁴⁶ Devrim K Badamchi, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' *Philosophy and Social Criticism* (2015), 41(9) 907-927.

⁴⁷ Ibid p.918

⁴⁸ Thomas Scanlon, 'A theory of freedom of expression' (1972) *one Philosophy & public affairs* 205-206.

⁴⁹ Ashutosh Bhagwat, 'Free Speech Wit out Democracy', UC Davis Law Review, 2015

⁵⁰ Ibid

⁵¹ (Scanlon 1972) 49

speech from others unconditional.⁵² Supporters of this theory claim that freedom of expression must be protected not for its contributory advantages including its function in democratic self-governance and discovery of the truth, but as an inherent human right that the government should not interfere with.⁵³

Finally, it should be noted that the above discussion could not be taken to be exhaustive since it is limited to some of the most widely known theoretical justifications. Be this as it might, this study trusts that it can fill in as a prologue for the following discussions.

2.2 International and Regional Human Rights Norms on Freedom of Expression

Different international and regional human right instruments were developed to protect the right to freedom of expression. For the purpose of this research, UDHR, ICCPR and ACHPR will be discussing.

2.2.1 Universal Declaration of Human Right (UDHR)

Article 19 of the UDHR, guarantees the right to freedom of expression in the following terms:

‘Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.⁵⁴

This provision has provided three aspects where the right to freedom of opinion and expression encompasses, these are:

- The right to hold opinions without interference
- The right of access to information
- The right to impart information and ideas of all kinds are among other things.

The UDHR is not legally binding document, however, most of its provisions including article 19, constitute general principle of law and widely used as customary international law.⁵⁵ Most importantly, it had become a benchmark for the development of ICCPR.

⁵² Guy Carmi, ‘Dignity, the enemy from within: a theoretical and comparative analysis of human dignity as a free speech justification’ (2007) *nine journal of constitutional law* 4 957.

⁵³ Mathew D Bunker, ‘*analyzing free speech: first, amendment theory and the challenge of interdisciplinary*’ (2001).

⁵⁴ UHDR, Article 19

⁵⁵M. Akehurst, ‘*Custom as a Source of International Law,*’ 48 *BYBIL*, 1974-1975, pp.1-53.

2.2.2 International Covenant on Civil and Political Rights

Article 19(1) of the ICCPR is also recognized the right to freedom of expression in the following manner:-

- Everyone shall have the right to hold opinions without interference.
- Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, orally, either in writing or in print, in the form of art, or through any other media of his choice

According to this provision, the right to freedom of expression has the following six major elements:-

First, it applies to ‘everyone’ without distinction of any kind. Second, its geographical scope is unlimited since it clearly provides that it apply ‘regardless of frontiers.’ Third, it has a broad substantive scope, which incorporates ‘information and ideas of all kinds.’⁵⁶ Fourth, by acknowledging the rights to ‘receive and impart information and ideas’ it does not only focus on the right of the person who imparts opinion but the rights of both listeners and speakers, and observers and demonstrators.⁵⁷

Just as it protects individual’s right to impart opinions, it also protects the right to know the opinions of others or to have access to information generally. Fifth, it imposes an obligation on State parties to ‘take the necessary steps’ and ensure the protection of the right, which includes adopting ‘laws or other measures as may be necessary’ and providing ‘an effective remedy’ to those whose rights have been violated.⁵⁸ In addition, the ECtHR has clarified that the right to freedom of expression encompasses “even expression that may be regarded as deeply offensive.”⁵⁹

⁵⁶ Ibid Article 19(2).

⁵⁷ Ibid

⁵⁸ According to article 2(2) of the ICCPR state parties are required to ‘take the necessary steps...to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present covenant,’ and to provide ‘an effective remedy’ to victims.

⁵⁹ European Court of Human Right, Handy side United Kingdom, (Application No. 5493/72), 1976.

2.2.3 The Right to Freedom of Expression under the African Human Right system

The African Human Right commission has stated in *Amnesty International v Zambia* case that ‘freedom of expression is a fundamental human right, essential to an individual personal development, political consciousness and participation in the public affairs of a country.’⁶⁰ ACHPR also recognizes the right to freedom of expression under article 9 by stipulating that ‘[e]very individual shall have the right to receive information and every individual shall have the right to express and disseminate his opinions within the law.’⁶¹

Thus, this provision just like the UDHR and the ICCPR protects both the right to information and freedom of expression. In this regard, the jurisprudence of the African Commission has shown that ‘freedom of expression includes one’s right to hold opinions, to seek, receive and impart information and ideas without interference or restrictions of any kind through any media.’⁶²

In addition, the African Charter on Democracy, Elections and Governance under article 27 specifies that State parties should obligate themselves to promote freedom of expression.⁶³ The African commission on human and people’s right also adopted a declaration on freedom of expression in Africa.⁶⁴ The Declaration provides a number of principles and standards on the right to freedom of expression, further, it calls states to take different measures and effort to the realization of the right in Africa.⁶⁵

Yet the Charter has been criticized for its extensive deployment of ”claw-back” clauses which permit States, unilateral discretion to restrict treaty obligation on the right guaranteed by the Charter thereby, manipulating the law.⁶⁶

⁶⁰ African Commission, Communication 212/98, *Amnesty International v Zambia* para 54

⁶¹ Ibid

⁶² African Commission, Communication No. 313105, *Kenneth Good v. The Republic of Botswana* Para 186.

⁶³ The African Charter on Democracy, Elections and Governance, Adopted by the eighth ordinary session of the Assembly, Addis Ababa, Ethiopia, 30 January 2007. Art 27.

⁶⁴ *Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples’ Rights, 32nd Session, 17-23 October 2002: Banjul, Gambia.

⁶⁵ Ibid. Article 16.

⁶⁶ Lovenss, Mapvva, ‘Negating the Promotion of Human Right, through “Claw-Back” clauses in Africa Charter on Human and People’s Right’ international Affair and Global Strategy, Vol.51, (2016)

2.3 Restrictions on the Right to Freedom of Expression

Article 19 (3) of the ICCPR, stipulates the exercise of the rights to freedom of expression provided under article 19(2) of the same instrument, carries special duties and responsibilities. Accordingly, the right may be subject to certain restrictions, but these shall only be when the limitations are 'provided by law' and 'are necessary for respect of the rights or reputations of others; for the protection of national security or of public order or of public health or morals.'⁶⁷Based on the above provision of the ICCPR the so called 'three-part test' has developed.

The same principles apply to electronic forms of communication or expression disseminated over the internet.⁶⁸ According to the UN Human Rights Committee General Comment No. 34 that:⁶⁹

'Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with restrictions provided under article 19(3) of ICCPR'.⁷⁰

2.3.1 Provided by Law

The first requirement for the legitimacy of a limitation on freedom of expression is that law should provide the restriction. Law by its broad definition can encompass legal, traditional, religious, and customary laws, therefore one should ask what kind of laws does this specific provision is referring to. However, for the purpose of article 19(3) 'law' may only include laws enacted by the legislative organ or the court, according to general comment No 34 of the HRC.⁷¹ Any form of restriction other than laws enacted by legislative organ or court is not acceptable.

In addition, for the purposes of article 19(3), the law, must be framed with appropriate precision and be made accessible to the public in order to 'enable individuals regulate their conduct accordingly.'⁷² In addition, limiting freedom of expression based on administrative provision or

⁶⁷ ICCPR Article 19 (3)

⁶⁸ Ibid

⁶⁹ Ibid Para 3

⁷⁰ Human Rights Committee's General Comment No 34' (2012

⁷¹ (M. A. Tadeq 2016) 24

⁷² Ibid

vague legislations amounts to violation of article 19(3).⁷³ According to the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, a limitation ‘provided by law’ is expected to provide an ‘adequate safeguard and effective remedies against illegal or abusive imposition or application of limitations on human rights.’⁷⁴ According to the HRC in cases of doubt, the burden of proof lies on the State party.⁷⁵

2.3.2 Legitimate Aim

The second legitimate ground of limitation of freedom of expression provided under article 19(3) of ICCPR is a limitation for legitimate aim. A permissible purpose or legitimate aim refers to the problem that is being address by the limitation. It basically requires states to achieve a purpose specified in the limitation clause when restricting rights.⁷⁶ The permissible grounds listed under article 19(3) are ‘respect for the rights or reputations of others’, ‘protection of national security or public order’, and ‘public health and public morals’.⁷⁷

Accordingly, any limitation even if the law provides it, will not be legitimate if its purpose is not providing under sub article 19(3). Respect for the rights and reputation of others is one of the most general interests listed under article 19(3) of the ICCPR.⁷⁸ This cause can cover an extremely wide range of possible reasons to limit freedom of expression since the term ‘others’ include rights held by groups, communities, as well as by individuals.⁷⁹ According to HRC, the term ‘rights’ refers to human rights recognized by the ICCPR and the whole international human rights law.⁸⁰

However, according to the Siracusa Principles the scope of ‘the rights of others that may act as a limitation upon rights in the Covenant’ is not limited to the rights recognized by the ICCPR or by the international human rights law, rather it extends to any right protected by a law which is

⁷³ Manfred Nowak, *ICCPR commentary (2005)* 438 & ‘Freedom of expression: A fundamental human right underpinning all civil liberties’ <https://en.unesco.org/70years/freedom-of-expression> Language= p.460 (accessed 5 Nov 2020).

⁷⁴ Syracuse Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (Syracuse Principles) Annex, UN Doc E/CN.4/1984/4 (1984) Para 18.

⁷⁵ UN HRC General Comment No 34 Para 27, see also communication No. 1553/2007, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006 7& Communication No. 132/1982, *Joana v. Madagascar*, Views adopted on 1 April 1985.

⁷⁶ ICCPR, Article 19(3)

⁷⁷ Ibid

⁷⁸ Mesenbet (n 11 above) 2

⁷⁹ See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

⁸⁰ UN HRC General Comment 34 Para 28

sufficiently accessible and clear.⁸¹ National security and public order is another form of permissible ground of legitimate aim, which enable to restrict the right to freedom of expression.⁸² However, National security cannot be use as a pretext for imposing vague or arbitrary limitations.

Regarding, ‘public order’ it does not only refer to the protection of physical order, rather it includes the rules and fundamental principles on which society is instituted.⁸³ The concept includes ‘the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual’⁸⁴

As per article 19(3) of the ICCPR, the protected interest of public health is found in almost all limitation clauses.⁸⁵ Regarding public morality, the concept is hard to define, it changes over time and varies from one culture to another, and this makes it very difficult to identify what exactly is being protected by the provision.

The HRC in General Comment No. 22 stated that ‘the concept of morals derives from many social, philosophical and religious traditions’ but it remains unclear what exactly, from this vast set of concepts would be sufficiently important to warrant intervention in the right to freedom of expression.⁸⁶ However, the HRC has clearly stated that any limitation on the bases of public morality ‘must be understood in the light of universality of human rights and the principle of non-discrimination’.⁸⁷

2.3.3 Necessity and Proportional

Any limitation imposed on freedom of expression must be important to pursue a permissible purpose. Necessity requires the existence of ‘pressing public or social need,’ ‘legitimate interest

⁸¹Ibid

⁸² Mesenbet (n 76 above) 8

⁸³ Ibid p.14

⁸⁴ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985 No. 5 Para. 66.

⁸⁵ Manfred Nowak, U.N. Covenant on Civil and Political Rights: ICCPR Commentary P.400 (Np Engel 2d. Rev. Ed. 2005);

⁸⁶ Toby Mendel, ‘Restricting freedom of expression: standards and principles’ Background paper for meetings hosted by the UN Special Rapporteur on Freedom of Opinion and Expression *Centre for Law and Democracy* 15.

⁸⁷ UN HRC General Comment 34 Para 32.

at stake,' and the use of least intrusive measure available which would effectively protect it.'⁸⁸
The HRC had also stated that⁸⁹

‘When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat’.

Since most of the interests listed in article 19(3) of the ICCPR including the rights of others, public morals, national security, and public order are open for interpretation, limitations imposed based on those criteria can strictly undermine freedom of expression and put the right itself at risk.

In this case, the question to ask would be, to what extent could the state go in limiting the right based on the grounds listed under article 19(3). The proportionality principle may answer this question. The principle is vital to distinguish acceptable and unacceptable limitations by comparing and balancing the impending harm intends to be prevent on the one hand and the gravity of the limitative measure on the other.⁹⁰

From the above statements, it is clear that the principle of proportionality is a central part of examining the necessity of a limitation. However, the applicability of the principle should not be limited to the requirement of necessity. The principle must be respect in the process of making the law that prescribes the limitation and by ‘administrative and judicial authorities in the process of applying the law.’⁹¹

⁸⁸ Mendel (n 120 above) 86, see also Siracusa Principles (n 106 above) Para 10, and Inter-American Court of Human Rights ‘Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism’ Advisory Opinion OC-5/85 (1985) Para 46.

⁸⁹UN HRC General Comment No. 34 Para 35.

⁹⁰Tsegaye Regassa, ‘Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia’ (2009) 3 *Mizan Law Review* p.305

⁹¹UN HRC General Comment No 34 Para 34 & General comment No. 27, Para. 14.

2.4 Conceptual Framework of Hate Speech

2.4.1 Definition and Background

While, there is no universally accepted definition of hate speech, States and institutions around the world have drawn their own conceptualization of hate speech.⁹² The term ‘hate speech’ was coined by a group of legal scholars in the late 1980s in the United States in response to what they saw as the way different legal systems tackled certain sorts of harmful racist speech.⁹³

Mari Matsuda, first used the term ‘hate speech’ in her seminal article on ‘public response to racist speech: considering the victim’s story’, in 1989. Her central purpose in using the term ‘hate speech’ was to highlight the way in which the legal system in the United States failed victims of harmful racist speech by providing them with inadequate means of seeking redress, civil or criminal.⁹⁴

Charles Lawrence also argued that ‘American campuses have seen a resurgence of racial violence and a corresponding rise in the incidence of verbal and symbolic assault and harassment to which blacks and other traditionally subjugated groups are subjected’.⁹⁵ Indeed, he urged the American government should take a legislative measure against most indefensible forms of hate speech.⁹⁶

Because of the work of legal scholars like Matsuda and Charles, the term ‘hate speech’ has now grasp the attention of legislators and legal professionals themselves more explicitly.⁹⁷ And then numerous legal scholars have put forward putative definitions of the term ‘hate speech’. However, they often concluded saying very different and contradictory things about hate speech. Massey defines hate speech as “any form of speech that produces the harms which advocates for suppression ascribe to hate speech: loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim, and effective exclusion from the political

⁹² Audrey Fino, Defining Hate Speech A seemingly Elusive Task, *Journal of International Criminal Justice* 18(2020) p.33

⁹³ Adibe J, “Fayose’s Advert: Offensive or Hate Speech?” adapted from conference paper presented at a roundtable on hate speech organized by the Kukah Centre and the MacArthur

⁹⁴ Andrew F. Sellars, Defining Hate Speech, (2016) The Berkman Klein Center for Internet & Society Research Publication Series <https://ssrn.com/abstract=2882244> (Accessed on May 21, 2021)

⁹⁵ Charles R Lawrence, ‘If He Hollers Let Him Go: Regulating Racial Speech on Campuses’, *Duke law Journal* Vol.1.1990:430

⁹⁶ Ibid

⁹⁷ Ibid

arena.”⁹⁸He notes that his approach “treat[s] all racists the same; polite, civil and unconscious racists are considered here to be no less malignant than the vulgar, nasty, and brutal ones.”⁹⁹

Contrary, Susan Baensch has looked particular components of hate speech that linked to the incitement of massive violence, which she calls “dangerous speech”¹⁰⁰.

Rather than providing a single meaning of hate speech, she lists out five variables to determine dangerousness of the speech, whether (1) there is a “powerful speaker with high degrees of influence;” (2) there is a receptive audience with “grievance and fear that the speaker can cultivate;” (3) a speech act “that is clearly understood as a call to violence;” (4) a social or historical context that is “all propitious for violence for any of variety of reasons;” and (5) an influential means of dissemination.¹⁰¹

Her formulation is specifically targeting towards incidents of mass violence and the speech that causes such violence, but similar contextual descriptors.¹⁰²

The Committee on the Elimination of Racial Discrimination understands ‘hate speech’ as “a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society.”¹⁰³

In fact, several of the reservations made to provisions of international documents such as Article 4 of the ICERD, which prohibits, amongst others, racist speech, is the free speech justification.

The ECtHR, in its decision in the case between *Gunduz vs. Turkey* 2003, instead of providing a definition to hate speech, it correlates hate speech with “all forms of expression which spread, incite, promote or justify hatred based on intolerance including religious intolerance”.¹⁰⁴

⁹⁸Calvin R. Massey, ‘*Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*’, 40 *UCLA L. Rev.* 103 (1992).

⁹⁹ *Ibid*

¹⁰⁰Susan Baensch, *Proposed Guidelines for Dangerous Speech*, Dangerous Speech Project (Feb. 23, 2013), <http://dangerousspeech.org/guidelines/>.

¹⁰¹An earlier version of Baensch’s formulation rearranged some of these elements, and looked also to whether the “marketplace of ideas” is still functioning.

¹⁰²Delgado, ‘*Words That Wound*’. *A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 *HARV. C.R.-C.L. L. REV.* 133, 178-79 (1982)

¹⁰³UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on combating racist hate speech, 26 September 2013, CERD/C/GC/35, para 7

¹⁰⁴*Gündüz v. Turkey*, App. no 35071/97 (ECtHR, 4 December 2003), para. 40, *Erbakan v. Turkey*, App. no. 59405/00 (6 July 2006), para. 56.

European Union’s “Framework Decision on Racial and Xenophobia combating certain forms and expressions of racism and xenophobia by means of criminal law”¹⁰⁵ has become relevant case to understand the concept of hate speech.¹⁰⁶

Ethiopia has also adopted a hate speech law to suppress the dissemination of hate speech.¹⁰⁷ Accordingly, article 2(2) of the proclamation define hate speech as ‘[a]speech that deliberately promotes hatred, discrimination or attack against a person or an discernable group of identity, based on ethnicity, religion, race, gender or disability;’¹⁰⁸.

“Hate speech seems to be whatever people choose it to mean” and, although States receive guidelines from institutions, such as the CERD, to prohibit the dissemination of racist ideas and racist expression, there is no technical analysis of themes such as thresholds and delineations between potentially conflicting freedoms such as expression and nondiscrimination.¹⁰⁹

2.4.2 Legal Developments on Hate Speech

While, it is difficult to find universal binding international human right law dealing with the issue of hate speech, the international community has made different attempts to guide implementation of international human right laws related with hate speech.¹¹⁰ This includes Rabat Plan of Action on prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.¹¹¹

Particularly, severity six-part test thresholds used to determining the threshold of severity that may warrant criminal sanction, States shall take in to account:

- A. prevailing of social and political context;
- b. Status of the speaker in relation to the audience;
- C. existence of clear intent to incite;
- D. content and form of the speech;
- E. extent of the speech including its public nature, size of audience and means of dissemination;

¹⁰⁵ Framework Decision 2008/913/JHA (Nov. 28, 2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?Uri=uriservpercentage3A133178> (hereinafter “EU Framework Decision on Racism and Xenophobia”).

¹⁰⁶ Bhikhu Parekh, *‘Is There a Case for Banning Hate Speech?’* (2012) Cambridge University, www.cambridge.org/core/books/ (Accessed on May 21, 2021)

¹⁰⁷ Ethiopian Hate Speech and Disinformation Proclamation, Article 2

¹⁰⁸ Ibid

¹⁰⁹ Alkiviadou, ‘the Legal Regulation of Hate Speech: The International and European Framework’, *Journal on politicka Miso* Vol, 55(2018) P. 203-229

¹¹⁰ Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, A/HRC/22/17/Add, January 2013

¹¹¹ Ibid para 29

F. real like hood and imminent of harm¹¹²However, these instruments are soft laws, which are not binding on State parties.

In contrast, there are fragmented international human right laws, which are relevant to the problem of hate speech. CERD is the first binding international treaty to deal directly with the issue of hate speech. Article, 4 (a) of the convention address the issue in the following manner:

‘States, shall declare an offence punishable by law, all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.’¹¹³

This provision prohibits racist ideas, propaganda and expression as well as racist acts of violence and incitement to such acts. It seeks to tackle racial hatred as manifested by both speech, acts and organized groups and racist speech uttered by public officials.

The CERD has also urging State parties that the incorporation of Article 4 into national legislation is “obligatory under the Convention for all States Parties”¹¹⁴ it also highlighted that enacting legislation is not sufficient for purposes of Article 4 compliance and that the proper implementation of such legislation is a necessary pre-requisite.¹¹⁵

Generally, the CERD has repeatedly underlines the significance of prohibiting hate speech nothing that free speech “carries special duties and responsibilities, among which is the obligation not to disseminate racial ideas”.¹¹⁶

Article 20 (2) of the ICCPR is also a relevant provision to govern the problem of hate speech, it imposes obligation on state parties to prohibit ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.¹¹⁷ However, article 20(2) does not mandate or authorize the banning of speech solely because it triggers or provokes undesirable outcomes.

¹¹² Ibid

¹¹³CERD art 4(a)

¹¹⁴ Concluding Observations: Japan, CERD, CERD/C/JPN/CO/7-9 (2014), para.10.

¹¹⁵ CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination, A/48/18 at 114 (1994), Para. 2.

¹¹⁶ CERD Concluding Observations: United States of America (2001) CERD/C/59/Misc. 17/Rev. 3, para. 12.

¹¹⁷ ICCPR, Article 20(2)

Rather, it encompasses a much narrower class of speech, specifically only that constitutes “advocacy” of racial, religious, or national hatred, and the advocacy of hatred must rise to the level of “incitement” to discrimination, hostility, or violence.¹¹⁸

However there is a discrepancy between article 4 of CERD and 20(2) of ICCPR, which is emanating from the wording of the two articles under consideration, with Article 4 of the CERD referring to the prohibited conduct being “punishable by law” and Article 20(2) of the ICCPR referring to the advocacy being “prohibited by law” rather than punished.

What is paradoxical is that while Article 4 prohibits the dissemination of racist ideas, Article 20(2) prohibits the advocacy for phenomena such as hatred and violence. The special Rapporteur on the right to Freedom of Opinion and Expression on its report, assessing 20(2) provides that ‘there is no requirement to criminalize such expression’¹¹⁹

Moreover, Convention on the Prevention and Punishment of the Crime of Genocide¹²⁰ and Rome Statute of the International Criminal Court¹²¹ requires the States to prohibit direct and public incitement to genocide and advocacy of any form of discriminatory hatred that constitutes incitement to discrimination, hostility or violence.

Regionally, the American Convention on Human Rights (ACHR)¹²² is the only regional human right instrument that clearly recognized and ban hate speech. However, according to the convention, the hate speech to be banned must comply with two conditions, which are: (1) the speech directly incites violence and (2) the speech is likely to give rise to imminent violence.¹²³

While, ACHPR¹²⁴ does not expressly prohibits hate speech. However, the draft declaration of principles on freedom of expression and access to information in Africa, which is adopted by African Commission on Human and Peoples’ Rights, recognizes and prohibits hate speech.¹²⁵

Principle 23 of the declaration stipulate

¹¹⁸Ibid

¹¹⁹ Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 47.

¹²⁰ United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Vol. 78, p 277, enter into force 12 January 1951

¹²¹The Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6

¹²² Article 13(5) of American Convention on Human Rights “Pact of San Jose”, Costa Rica, on 22 November 1963

¹²³ UN, United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance 2020

¹²⁴ African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/3 June 1981.

¹²⁵ Declaration of Principles on Freedom of Expression and Access to Information in Africa, Draft issued by the Special Rapporteur on Freedom of Expression and Access to Information in Africa, for consultation with States and

1. States shall prohibit any speech that advocate for national, racial, religious or other forms of discriminatory hatred, which constitutes incitement to discrimination, hostility or violence.

2. States shall criminalize prohibited speech as a last resort and only for the most severe cases.

This provision incorporates contents of article 20(2) of the ICCPR and recognized criminalization of hate expression only for severe cases, which is provided under Rabat Plan of Action. Even though, hate speech is a global problem, there is no single binding international law to regulate the problem; as such, the development of jurisprudence at global and regional level is not enough.

2.5 Types of Hate Speech

Based on their severity under international human right law hate speech is categorizes into three.¹²⁶ Understanding these categories has a paramount relevance to make it easier to identify appropriate and effective responses to the problem. Namely, hate speech that must be prohibit, hate speech that may prohibited and lawful hate speech.

2.5.1 Hate Speech that must be prohibited

Some International Human Rights Laws are requiring States to prohibit certain severe forms of “hate speech”, through criminal, civil and administrative measures. The first category of these expression is ‘a speech that direct and public incitement to genocide’.

Article 3(1) of Convention on Prevention and Punishment of the Genocide¹²⁷ and Article 6 and 25(3) (c) of the Rome Statute of International Criminal Court are clearly prohibit and punish the act. Second, any advocacy of discriminatory hatred that constitutes incitement to discrimination, hostility or violence is category of speech must prohibit. Article 20(2) of ICCPR analogous these forms of expression, but to must meet the legitimate requirements of restrictions of article 19(3) of ICCPR.¹²⁸

The Committee on the Elimination of Racial Discrimination recently adopted General Recommendation No. 35 on “combating racist hate speech,” which clarifies the scope of these

other Stakeholders, pursuant to Resolution 350 (ACHPR/Res.350 (EXT.OS/XX) 2016) of the African Commission on Human and Peoples’ Rights. 30 April 2019

¹²⁶ A toolkit, ‘hate speech’ explained <http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode>. 2015 p.18

¹²⁷The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN Treaty Series, vol. 78, p. 277, Article 3(c).

¹²⁸Article 20(2) of the ICCPR only specifically requires prohibitions on the advocacy of national, racial and religious hatred. However, ARTICLE 19 argues that advocacy of hatred based on all other recognized characteristics protected from discrimination under international human rights law.

provisions vis-à-vis the protection of the right to freedom of expression.¹²⁹ The CERD contains much broader positive obligations on member States to prohibit particular types of speech than in Article 20(2) of the ICCPR. Article 19 has previously recommended ways in which this conflict can be reconciled, based on the Vienna Convention on the Law of Treaties.¹³⁰

2.5.2 Hate Speech that may be prohibited

International human right laws permit States to restrict expression in limited and exceptional circumstances, comply with the three-part test under Article 19(3) of the ICCPR. A hate speech targeting individual or identifiable victim is a good example for this category. This type of ‘hate speech’, which does not fit within the criteria of Article 20(2) of the ICCPR because the speaker does not seek to incite others to take an action against persons because of a protected characteristic.

These types of ‘hate speech’ include threats of violence, harassment and assault. Such kind of expressions are address by either defamation law, or laws on crime against reputation

2.5.3 Lawful hate speech

Though, expression may be inflammatory or offensive but not meet the severity thresholds which includes, the speech is not direct and public incitement to genocide, the speech is not an advocacy of discrimination hatred that constitutes incitement to discrimination, hostility and violence and does not promote racial hatred and discrimination. This expression may be characterized by prejudice, and raise concerns over intolerance, but does not meet the threshold of severity.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximizing opportunities for all people, including public officials and institutions, to engage in counter-speech.

¹²⁹ICERD Committee, CERD/C/GC/35, 9 September 2013.

¹³⁰Vienna Convention on the Law of Treaties, 1969, Articles 31 and 32.

2.6 Aspects of the Offense of Hate Speech

International laws related with the right to freedom of expression have a limitation on what may be ban as a hate speech.¹³¹ To tackle this problem understanding three key aspect of hate speech including intent, incitement and what results are prohibited is important.

2.6.1 Intent

Under international human right laws, the advocacy element can be understood as intent requirement, so that only statements made with the intent of inciting hatred are covered.¹³² The importance of including intent in hate speech crimes is illustrated well by a case from Denmark. In that case, Jersild, a journalist, had been convicted for a television program, which included hate speech statements by racist extremists, although the purpose of the program was really to expose racism in Denmark.¹³³

However, the ECtHR by a clear majority but not a unanimous decision held that the conviction by the Danish courts was a breach of Jersild' right to freedom of expression.¹³⁴ The Court took into account the fact that the statements were made in the context of a serious program intended for an informed audience and dealing with social and political issues. It also relied heavily on its finding that Jersild's purpose or intent was not to promote racism but on the contrary, to expose and analyze it.

2.6.2 Incitement

International human right laws applying on hate speech, namely article 20(2) of ICCPR and article 4(a) CERD require incitement to restrict and punish a speech as a hate speech. However the question what constitute incitement is complex and controversial. The UN High Commissioner for Human Rights, for example, has expressed concern at the fact that this term lacks clear definition in international law.¹³⁵ International courts have looked at a number of

¹³¹ Toby Mendel, P.9

¹³² Ibid

¹³³ *Jersild v. Denmark*, 22 August 1994, Application No. 15890/89. The Court noted the difference of opinion within the CERD Committee and opined that its decision was compatible with CERD. See Para. 21 & 30.

¹³⁴ Ibid

¹³⁵ Study of the United Nations High Commissioner for Human Rights compiling existing legislations and Jurisprudence concerning defamation of and contempt for religions, UN Doc. A/HRC/9/25, 5 September 2008, Para. 24.

factors when assessing whether incitement is present, focusing on the nexus between the statements and the proscribed result, and issues such as causation and context.¹³⁶

2.6.3 Prohibited Results

International human right laws prohibit incitement to violence or similar illegal action. For instance article 4 (a) of the CERD and 20(2) of ICCPR have additionally prohibitions discrimination and hatred. Article 4 (a) of CERD goes even further, calling for the prohibition of all ideas based on superiority. Generally, the speech should result discrimination, violence or hostility to consider as a hate speech under international human right laws.

¹³⁶*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, Para. 101. See also 18 October 2000, Communication No. 736/1997, Para. 11

CHAPTER THREE

THE IMPLICATION OF THE HATE SPEECH LAW ON FREEDOM OF EXPRESSION IN ETHIOPIA

3.1 Introductory Overview

Since 2018, the government of Ethiopia has making political and legal reforms aimed at addressing its long history of human right suppression.¹³⁷ While, following the political reform, the rise of displacements, killings, and violence accelerated by ethno-nationalist discriminatory discourses on social media platforms such as Face book and private mainstream Medias created a fervent debate on the role of the state in regulating hate speech.¹³⁸

Since, the new constitutional order was introduce in Ethiopia in 1995; the use of hate speech has been resuscitate in part because of the ethnic federalism that the very state upholds and the silencing of nationalist sentiments in the political discourse.¹³⁹ In addition, the constitution clearly promotes inter-ethnic clashes by stipulating, that there was historically unjust relationship between and among different ethnic groups.¹⁴⁰

Moreover, discriminatory regional constitutions based on the “natives-settlers” dichotomy are creating a systematic institutional and legal hatred of settlers.¹⁴¹ The Amhara, for instance, have their traditional territory in the Amhara region and are therefore settler to the Tigray region.¹⁴² Such distinction between native and settler groups is made in all regions, either in the regional constitutions or politically.¹⁴³

Having a native settler status has significant implications for the legal status of empowered in the regional states.¹⁴⁴ ‘Opposition political groups ‘particularly, "elites" uses hate speech to demonstrate, seek or reinforce their power.¹⁴⁵ For example, the term “Nefitegna” has been used as

¹³⁷ Collaboration on International ICT policy for East and Southern Africa (CIPESA), Analysis of Ethiopian Hate speech and Disinformation prevention and Suppression proclamation No. 1185/2020, July 2020

¹³⁸ Ibid

¹³⁹ Mesenbet (n 11 above) 9

¹⁴⁰ See the preamble of FDRE Constitution

¹⁴¹ The Constitution of the Regional government of Benishangul Gumuz, Article 2 , Asossa, 2003

¹⁴² V.Beken, ‘Balancing Between Empowerment and Inclusion: Multinational Federalism and Citizenship Right in Ethiopia’, *African Journal of International and Comparative Law* 27. (2019): p594

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ David Kaye, United Nations Special Rapporteur on the right to freedom of opinion and expression, his recommendations on the draft hate speech and disinformation proclamation, during his visit Ethiopia, between December 2-9, 2019

‘a dog whistle call’ for ethnic based violence against Amharas¹⁴⁶. Indeed, hate speech is sensitive form of expression in Ethiopia.¹⁴⁷ Perhaps also, some irresponsible social media users under the guise of freedom of expression are creating social and political disorders in Ethiopia.

For instance, Ethiopian Human Rights Commission (EHRC) under its investigation and findings report of violence and attacks following the death of activist Hachalu Hundessa has asserted that, extensive human right violations and crime against humanity are committed in different part of the country, which was leading and escalated by social-medias.¹⁴⁸

The violence targeted minority communities in Oromia particularly Amharas, as the result of hate speech preaching by social-media. The commission has also expressed its concern of potential genocide and atrocity crimes in the country.¹⁴⁹

The Ethiopian Constitution recognizes the right to freedom of expression and Ethiopia ratified different international human right laws applying on the right to freedom of expression, mainly the ICCPR in 1993¹⁵⁰ Nonetheless, ‘any propaganda for war’ and ‘the public expression of opinion intended to injure human dignity’ are prohibit under the Constitution.¹⁵¹

Indeed, to tackle these problems the government of Ethiopia has adopted the hate speech law in 2020. In order to understand the prevalence, scope and depth of the problem of hate speech in Ethiopia, An intensive research was conducted in different part of the country these include Amhara, Tigray and Oromia Regional States before the enactment of the law.¹⁵²

As it is clearly stipulated under article 3 of the hate speech proclamation, the main purpose of the law is to suppress hate speech and disinformation, which may ‘likely to cause public disturbance or promotes hatred and discrimination against a person or an identifiable group or community based on ethnicity, religion, race, gender or disability’.¹⁵³

¹⁴⁶ Ibid

¹⁴⁷ Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, the regulation of online ‘hate speech’, 74th session, Agenda item 70(b), A/74/486 (9 October 2019), https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf (accessed 23 January 2020).

¹⁴⁸ The Ethiopian human Rights Commission investigation report and findings January 2021

¹⁴⁹ Ibid

¹⁵⁰ FDRE Constitution Article 29(6)

¹⁵¹ Ibid

¹⁵² Interview with Mr. Solomon Getachew, Public Prosecutor and team leader of legal awareness, education and research directorate at Federal Attorney General, Addis Ababa, (28 April, 2021).

¹⁵³ Ethiopian Hate Speech and Disinformation proclamation, ,Article 3(1)

In order to tackle potential inter-ethnic clashes, atrocity crime and genocide, legislative intervention of hate speech may be necessary on the eyes of international human right instruments.

3.2 The Right to Freedom of Expression and Its Restrictions under the FDRE Constitution

The 1995 FDRE Constitution has incorporated freedom of expression as a fundamental right under article 29. In addition, Ethiopia is a party to the ICCPR and ACHPR. These two instruments as discussed in the previous chapters provide protection to freedom of expression.¹⁵⁴ These instruments based on article 26 of VCLT, article 1 of ACHPR & article 2(2) of ICCPR are binding upon the country and must be perform in good faith. Besides, by virtue of article 9(4) of the constitution which states that international instruments, ratified by the country, are considered as ‘an integral part of the law of the land’ the ICCPR and ACHPR can be considered as part of Ethiopian laws.’¹⁵⁵

However, article 10 of the FDRE constitution categorize human rights stipulated under chapter three of the constitution in two parts, the first part provides for ‘Human Right’ and freedoms, emanating from the nature of mankind, are inviolable and inalienable as such are universal and has more protection.¹⁵⁶ The second are ‘Democratic Rights’ which are the right of citizens and ‘peoples’, derived from their juridical and political status which may has less protection.¹⁵⁷

Moreover, the FDRE Constitution stipulates that chapter three of the Constitution ‘shall be interpreted in a manner conforming to the principles of the international human rights instruments adopted by Ethiopia.’¹⁵⁸ Accordingly, the relevant provisions of the Universal Declaration, ICCPR, ACHPR and other relevant human rights instruments ratified by Ethiopia must read together with article 27 of the FDRE Constitution in order to have a full understanding of the legal regime that is expect to provide protection to freedom of expression in Ethiopia.

Thus, limitations imposed on freedom of expression in Ethiopia must pass the three-part test as discussed in the chapter two. Which means limitations should ways provided by the law, which

¹⁵⁴ Vienna Convention on The Law of Treaties 1969, art 26 ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Art 1 of ACHPR & 2(2) of ICCPR also obliges states to take necessary measures to ensure the realization of Human Rights.

¹⁵⁵ FDRE Constitution article 9(4)

¹⁵⁶ Gideon (n 3 above)

¹⁵⁷ Ibid

¹⁵⁸ FDRE Constitution article 13

is, formulated in a sufficient precision, for permissible or legitimate aim and to the extent that it is necessary and reasonably proportionate.

The FDRE Constitution which classifies its bill of rights chapter in to 'Human Rights' and 'Democratic Rights' places freedom of expression as one of the democratic rights. Article 29 of the FDRE Constitution provides for the 'right of thought, opinion and expression' in the following terms: ¹⁵⁹

- 1) Everyone has the right to hold opinions without interference.
- 2) Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, orally, either in writing or in print, in the form of art, or through any media of his choice.

These two sub-articles clearly show a range of protection to the right to freedom of expression and opinion. In addition, article 29(6) provides legitimate grounds to limit the right to freedom of expression in the following manner:

'[It] can be limited only through laws, which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honor and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.'¹⁶⁰

This provision provides how and in what grounds freedom of expression can be limited.

This sub article contains three main clauses. First, it stipulates that any limitation on freedom of expression must be prescribe by the law and identifies two grounds in which freedom of expression cannot be limited. Accordingly, the right to freedom of expression and information cannot be limited on the bases of the 'content of expression or effect of the viewpoint expressed.' Second, the sub-article identifies two permissible grounds for limitation, which are, 'protection of the well-being of the youth' and 'honor and reputation of individuals.'¹⁶¹

This statement clearly shows that the prohibition against 'content and effect-based restrictions' is not an absolute prohibition. Surprisingly this provision did not incorporate 'public order' and

¹⁵⁹ FDRE Constitution article 29

¹⁶⁰Ibid

¹⁶¹ Ibid

'security' as permissible grounds of limitation. However, based on the cumulative reading of article 9 of the FDRE Constitution, which recognizes international agreements as part of the law of the country and article 19(3) of the ICCPR they can be incorporate under permissible grounds. Finally, the sub-article identifies prohibited expressions, accordingly, it states that 'any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law' and left the details of the prohibition for the legislative organ. Henok, criticizes this provision for exposing the right for excessive limitation by allowing limitations on the grounds of 'well-being of the youth' and 'human dignity,' concepts which are not envisaged as a legitimate aim under the ICCPR and do not have a clear-cut definition in the countries legal system.¹⁶²

Also, article 29(7) deals with limitations. It stipulates that 'any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.' Gideon argues that this provision should not be read by itself without taking article 29(6) into account. He states that such reading is very dangerous since it might be understood as saying 'so long as a limitation of the right has a legal or statutory basis, it is acceptable.'¹⁶³

Such an interpretation will make article 29(6) worthless and contradict it completely. If every legislative limitation made is considered to be valid, then there would have been no need to provide grounds of limitation freedom of expression under article 29(6).

The other issue worth discussing here is the issue arising from the classification of rights as human rights and democratic rights. As mentioned above, the FDRE Constitution classifies its bill of rights chapter in to 'Human Rights' and 'Democratic Rights.' Accordingly, the freedom of expression is incorporated under democratic rights. Though it is debatable this division can have an impact on the level of protection provided to the two categories of rights.

According to article 10 of the FDRE Constitution, 'Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable' while 'democratic rights of citizens and peoples shall be respected'.¹⁶⁴ Based on this provision some argue that the Constitution provides a greater protection for the rights it classifies as 'human rights and freedoms' rather than the

¹⁶² Henok A Gebeyehu 'Freedom of expression and the Ethiopian anti-terrorism proclamation: a comparative analysis' (2016) 5 *Haramaya Law Review* 95.

¹⁶³ Gideon (n 3above)

¹⁶⁴ FDRE Constitution, Art 10(1) & (2).

‘democratic rights’ which are not ‘inviolable and inalienable’ but are simply to be ‘respected.’¹⁶⁵ Accordingly, in cases of a conflict between fundamental human rights and democratic rights, the constitution gives a better protection to the former.¹⁶⁶

3.3 The Implication of the Hate Speech Law on Social Media Usage in Ethiopia

The free media in general, and free and accessible social media in particular is considering as an opportunity to ensure the right to freedom of expression. In a digital world, people are highly dependent on internet for social service, including access to information, blogging service, and daily message and accessing health service.¹⁶⁷

Thus, when the state or internet service providers block or otherwise disrupt the internet, it unequivocally affects free speech.¹⁶⁸ Freedom of expression on the internet is also protecting under the Constitution of Ethiopia, as the Constitution allows expression of ideas using any media.¹⁶⁹

The Ethiopia Constitution also stipulates restrictions on the right, such as legal limitations to protect the well-being of the youth; the honor and reputation of individuals; any propaganda for war; and the public expression of opinion intended to injure human dignity.¹⁷⁰

Recent technological developments allow Internet users to disseminate ideas to a large audience.¹⁷¹ Unlike in the real world, where social manners can sometimes seem restrictive and limiting, people feel they have a greater sense of freedom of expression and speech when using online networks.¹⁷² These technological advances empower individuals and promote important social objectives.¹⁷³

However, they also create a setting for speech-related torts, harm, and abuse. The incidence and use of hate speech has also increased with the advent of different internet-based social media platforms.¹⁷⁴ Therefore, online networks particularly social-medias are creating a great sense of freedom of expression for individuals; however, it requires some sort of limitations to promote

¹⁶⁵ Gideon (n 3above) 208.

¹⁶⁶ Ibid

¹⁶⁷ Frank La Rue, United Nations General Assembly, the report of Special Rapporteur on the right to freedom of Opinion and Expression on hate speech (A/67/357), (2012)

¹⁶⁸ Ibid

¹⁶⁹ FDRE constitution Article 29(5)

¹⁷⁰ Ibid

¹⁷¹ Michal Levi, ‘Content Providers’ Secondary Liability: A Social Network Perspective’, 26 Fordham Intel. Prop. Media & ENT. L.J. 855 (2016).

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ David Kaye (n above) p.27

responsible usage. However, in recent years, social-media has become a leading factor for violence and loss of human life in Ethiopia. A survey study on online hate speech in Ethiopia by the University of Oxford clearly demonstrated the increase in the use of hate speech in the contemporary political discourse in the country.¹⁷⁵

In addition, following an incident with a popular Oromo activist and media owner, Jawar Mohammed social-media post, urging that his securities were lifted and he is threatening of security, around 67 persons were killed in clashes.¹⁷⁶ However, article 4 of the hate speech law clearly prohibits the dissemination of hate speech on social-media by using text, image audio and video.¹⁷⁷

The Proclamation also defines the term social-media as: ‘Any social interactive method that facilitate the creation and sharing of information for more than one person at one time and Social networking through the internet; ‘

This definition is overly broad and it is not clear whether sharing purported false messages with closed group on messaging apps would constitute an offence. While the law has clarified that engaging in ordinary social media activities such as tagging or liking certain content does not constitute criminal liability, it is not clear whether re-sharing or re-posting the content would be illegal. Before the enactment of this law, the government of Ethiopia has been used different laws to regulate irresponsible social-media users. These include Ethiopian Criminal code of 2004¹⁷⁸, Computer Crime law¹⁷⁹ and the Anti-terrorism law.¹⁸⁰

However, these laws were problematic particularly the anti-terrorism proclamation was criticized by its repressive nature to regulate irresponsible social-media users. For instance, the famous case of Yonatan Tesfaye, who was an activist and former spokesperson of the opposition Semayawi party, is a good example to demonstrate the issue. He was found guilty of encouraging terrorism.¹⁸¹ His several Face book posts including the one he wrote saying ‘the

¹⁷⁵ European Peace Institute, on vulnerability assessment on hate speech, fake news and misinformation in digital media in Ethiopia. See here <<https://www.eip.org/new-publication-fake-news-misinformation-and-hate-speech-in-ethiopia-a-vulnerability-assessment/>>

¹⁷⁶ News on France 24 English, October 29,2019 <http://f24.my/youtubeEN> (Accessed on February 22, 2021)

¹⁷⁷ Ethiopian hate speech and disinformation proclamation, Article 4

¹⁷⁸ Preamble of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Federal Negarit Gazeta, Addis Ababa, 9th May 2005

¹⁷⁹ Computer crime proclamation no. 958/2016, 22nd Year No. 83 Addis Ababa 7th July, 2016

¹⁸⁰ Anti-terrorism proclamation no. 652/2009, 15th year no. 57 Addis Ababa 28th august, 2009,here in after as anti - terrorism proclamation

¹⁸¹ *Federal Public Prosecutor Vs Yonatan Tesfaye Regassa*, Charge, F/P/P 414/08, 04 May 2016.

government used force against the people instead of peaceful discussion’ was used as evidence against him.¹⁸² However, he was arguing that he was solely exercising his constitutional right to freedom of expression without exceeding the limit, the court chose to disregard his claim and apply article 6 of the anti-terrorism proclamation.¹⁸³

The decision of the court was against article 29 of the constitution and international human right laws applying to the right to freedom of expression. Similarly, the hate speech law has incorporated problematic provisions to suppress online expressions, for instance Article 7 stipulate liability and excessive punishment for those with 5,000 followers, the threat of excessive penalties for those with a certain number of followers will serve to target and disproportionately affect the free expression of bloggers, journalists, activists, and human right defenders.¹⁸⁴

The detention of journalist Yayesew Shimels is a good example, after he published information on his Face book page about the government’s alleged preparation of 200,000 burial plots for those killed by Covid-19 virus, as the FDRE Attorney General expressed that he is accused in violation of Article 5 and 7/4/ of the hate speech proclamation.¹⁸⁵ Nevertheless, he was released on bail with no final judgment on his case.¹⁸⁶

The proclamation also impose a duty on social media service providers endeavor to suppress and prevent the dissemination of hate speech, to remove or take out the circulation of hate speech upon receiving notifications and must have policies and procedures to discharge their duties.¹⁸⁷ However, there is language and resource limitation to enforce this obligation, and they are not feasible. Accordingly, the hate speech law is a special law applying to regulate irresponsible social media usage, however, this law could easily manipulate by government officials to censor freedom of expression on social media.

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ethiopian hate speech and disinformation proclamation, Article 7(4)

¹⁸⁵ International Press Institute, Journalist’s detention sparks concern over Ethiopia’s new hate speech law, March 27, 2021

¹⁸⁶ Ethiopian 2020 Human Right Report

¹⁸⁷ Ethiopian hate speech and disinformation proclamation, Article 8

3.4 Compatibility of Ethiopian Hate Speech Law with International Laws Applying on Freedom of Expression

3.4.1 Vague and Unclear Definitions of Hate Speech

The definition of hate speech provided under the proclamation is not clear and precise. This definition ‘opening up loopholes for arbitrary application of the law and creating a breeding ground for human right violations’, particularly the right to freedom of expression.¹⁸⁸ From this definition, it is difficult to determine the scope of hate speech, namely where the legitimate free speech stops and where hate speech starts.¹⁸⁹

The proclamation has also fail to make a clear distinction between expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.¹⁹⁰

In this regard international human right standards differentiate between types of hate speech based on severity parameters under article 20(2) of the ICCPR and the six-part test under the Rabat plan of action, these includes context, the status of the speaker, intent, content, audience and the likelihood of effectively inciting harm. In addition Article 20(2) Para 2 of the ICCPR requires an element of incitement to violence, discrimination, or hostility, however the hate speech law does not recognized the term incitement.

The term ‘incitement’ refers to statements about national, racial or religious groups, which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.¹⁹¹ Article 20 of the ICCPR also provides the requirement of intent.¹⁹² Negligence and recklessness are not sufficient for an act to be an offence under article 20(2) of the Covenant. Similarly, the proclamation has also incorporated the ‘intent’ element through the word ‘deliberate’ in its definition.¹⁹³ However, the law uses the term ‘promote’ instead of ‘advocates’.

¹⁸⁸ Birihan (n 12 above)

¹⁸⁹ Ibid

¹⁹⁰ David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 9 October 2019, A/74/486

¹⁹¹ UN HRC General Comment No. 34, Para 21

¹⁹² ICCPR Article 20(2)

¹⁹³ Ethiopian hate speech proclamation, Article 2(2)

‘The term ‘promotes’ does not refer neither intent requirement nor intention to encourage hatred, discrimination or attack towards the targeted group.’ In contrast, the term ‘advocacy’ set out an intention to promote hatred publicly towards the target group. The lists of grounds of hate speech are ethnicity, race, gender or disability, however, the proclamation is not clear whether these grounds are exhaustive or illustrative.

Article 20 of the ICCPR requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception.¹⁹⁴ Such threshold must take into account the provisions of article 19 of the Covenant. Indeed the three-part test for restrictions of the right to freedom of expression are also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest.¹⁹⁵

This means,’ that restrictions are clearly and narrowly defined, and respond to a pressing social need, which are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way. And are proportionate so that the benefit to the protect interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize’.¹⁹⁶

Another definitional problem of the hate speech law is the definition of the term violence under article 2(6) of the proclamation. This provision defines the term: “violence” as ‘any injury of property, body or life against on and individual or a group of persons’.¹⁹⁷ However, this definition failed to incorporate psychological violence.

Nonetheless, the excessive vagueness of the proclamation could create the officials at the federal and regional level unbounded discretion to determine whom to investigate and prosecute, leading to an almost certain inconsistency in approach and a potential wave of arbitrary arrests and prosecutions.¹⁹⁸ In addition it is against legality requirement of article 19(3) of the ICCPR and

¹⁹⁴ Ibid

¹⁹⁵ ICCPR 19(3)

¹⁹⁶ Ibid

¹⁹⁷ Ethiopian hate speech proclamation, Article 2 (6)

¹⁹⁸International Press Institute, Journalist’s detention sparks concern over Ethiopia’s new hate speech law, March 27, 2021 accessed on April 18, 2021

article 29 (5) of the Ethiopian Constitution.¹⁹⁹ By contrast, Article 20(2) provides a specific and internationally recognized definition of hateful advocacy, which international mechanisms have interpreted. The definitions of hate speech, which, if not more narrowly defined, to specifically address incitement to violence, discrimination, or illegality, may end up stifling legitimate expressions of dissent.²⁰⁰ However, under international human right law, laws to tackle hate speech must be carefully construed and applied by the judiciary, not to excessively curtail legitimate types of expressions.²⁰¹

3.4.2 Disproportionate Criminal Punishments

Concerning the legal framework on hate speech before the enactment of the proclamation, fragmented whereby provisions in different pieces of legislations can be apply to the case of hate speech.²⁰² However, these laws were provide extensive power to public prosecutors and police to abuse individuals' right to expression under the guise of protecting against violent political, racial, and religious disturbances.²⁰³

In understanding the problem the drafter of the hate speech proclamation, repeal this provision.²⁰⁴ However, criminal liabilities under proclamation are not meeting the standards of necessity and proportionality provided under Article 19(3) of the ICCPR.²⁰⁵ The CERD committee also recommended that criminalization of racial expression should be reserved for severe cases, must be proven beyond reasonable doubt and criminal punishment should be last resort.²⁰⁶

However, criminal penalties stipulated under article 7 of the proclamation are remain sever. The penalties are separate based on whether the offence of hate speech resulted violence or public disturbance. As it stands, the proclamation involves fine penalties of 50,000-100,000 birr, in addition to providing for a maximum prison sentence of five years.²⁰⁷ The decisions of Sheka

¹⁹⁹ FDRE constitution, Article 29 (5)

²⁰⁰ Human Right Watch, world report, 2020, www.hrw.org<country-chapter>Ethiopia (date of access February 10, 2021)

²⁰¹(David Kaye), Para 31

²⁰² Yared Legesse,' Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws' in Michael Herz and Peter Molnar (Eds) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University 2012) 352

²⁰³ Ibid

²⁰⁴ Ethiopian hate speech proclamation, Article 9

²⁰⁵ Ibid

²⁰⁶ David Kaye, p.27

²⁰⁷Ibid

Zone High Court is a good example to demonstrate more this issue.²⁰⁸ In this case the defendants were accused of dissemination of ethnic based hate speech which, causes violence including attack, death, displacement and property destruction in the city of Mizan Tepi, the Court convicted the defendants with a rigorous imprisonment of 9 years each, based on art 4 and 7 (2) of the hate speech law in tandem with art 32(2) (a) and 485(2) the FDRE Criminal law. Yet, the decision of the court was beyond the penalty stipulated under art 7(2) the hate speech law, which is five years and the aim required by the lawmaker, indeed, from this decision it is easy to conclude that, the law enforcement bodies could make the law more sever and enter prate it beyond the limit.

The proclamation also stipulate liability and excessive punishment for those with 5,000 follower, the threat of excessive penalties for those with a certain number of followers will serve to target and disproportionately affect the free expression of bloggers, journalists, activists, and human right defenders.²⁰⁹

However, under international human right standards, the obligation to prohibit the most severe types of hate speech that is incitement to violence or public disturbance requires the states to introduce a variety of sanctions. The selection of sanction is based on the assessment of the level of severity of the offence; primarily states should employ a range of civil and administrative measures.²¹⁰

Moreover, the necessity test under article 19 of ICCPR requires that the list intrusive effective remedy should be employed when restricting speech to protect overriding public or private interests.²¹¹ Any such restrictions however must conform to the three-part test under article 19(3) of the ICCPR. Further, the Human Rights Committee, in its General Comment 34, referred to Article 19(3)'s conditions as "strict tests," under which restrictions "must be directly related to the specific need on which they are predicated."²¹²

Accordingly, the harsher the penalty, the greater the need for demonstrating strict necessity. It may be that criminal penalties would be appropriate if the definitions and prohibitions apply to the expression identified in Article 20(2) of the ICCPR and the proclamation included the careful

²⁰⁸FastMereja.net South Television news on Dec 16, 2020 11:00 am.(accessed on December 16,2020).

²⁰⁹Rabat Plan of Action Para 29

²¹⁰Ibid

²¹¹ Ethiopia: Hate Speech and disinformation law must not be used to suppress the criticism of the government, www.article19.org January 19 2021 (accessed on April 27)

²¹² HRC General Comment No.34, 2011

factors identified in the Rabat Plan of Action.²¹³ However, criminal punishment because of the unclear scope of the law would likely be unable to meet the standards of Article 19(3), particularly the proportionality and necessity test. As such, the proclamation should have been enacting in a human right friendly manner.

3.4.3 Problematic Delegated Censorship Obligations to Social-Media Service Providers

Article 8(1) of the proclamation requires service providers to “endeavor to suppress and prevent the dissemination of disinformation and hate speech through its platform.”²¹⁴ It further provides that providers “act within twenty-four hours”²¹⁵ to remove infringing content “upon receiving notifications about such notification. However, the proclamation is not clear on who provides this notification there is no authority named, meaning that the platform could be expect to take down any content that an individual or government entity report.”²¹⁶

This improperly delegates judicial functions to social media platforms and fails to provide people with a process for remedy if their content is taking down in error.²¹⁷ Any order of takedown should come from competent judicial organ and users should have the ability to appeal a decision and should have the right to receive written notice of why and under which legal provisions their freedom to speak is curtailed²¹⁸.

Taking down within 24 hours is also not a reasonable period, which reduced the opportunity for judicial oversight or review by a similar independent adjudicatory authority.²¹⁹ Indeed, users effectively have no rights and these short takedown notice is alarmingly present a host of due process concern.²²⁰

Concerning who may provide notice to takedown of a hate speech content? The proclamation does not mandate a specific body to do so. As such it may raise a question, does this mean any person can compel a social media provider to take down content? In practice to answer this

²¹³Rabat Plan of Action

²¹⁴Ethiopian Hate Speech Proclamation, Article 8(1)

²¹⁵ Ibid Article 8(2)

²¹⁶ Ibid 8(1)

²¹⁷ Ibid

²¹⁸ Ibid

²¹⁹ Birhan (n 182 above)

²²⁰ Ibid

question, Ethiopian Broadcast Corporation has established office of Online and Foreign Media Monitoring Directorate, which has a mandate to report.²²¹

As per Article 8(4) of the proclamation, Ethiopian Broadcast Corporation has an obligation “to prepare a report which notify to the public on social media enterprise whether they discharge their duty properly” and promotional mandate under.²²² As such in practice the Online and Foreign Media Monitoring Directorate of Ethiopian Broadcast Corporation has discharge reporting of hateful contents to social-media platforms, however the EBC does not appear to have the power to report and force social media platforms to take down content that’s deemed harmful, and it’s not clear how it will monitor compliance of social media platforms.

Article 8 is also failed to adopt principles and penalties to hold social-media companies accountable for failure to counter the spread of hate contents, the onerous nature of penalties in other sections means that providers are more likely to error on the side of removing content (censorship) in order to avoid sanction.²²³

The proclamation is more likely to increase the pressure on local content creators, video streaming service, indigenous counter-parts, simply because they are easier to reach.²²⁴ This is incompatible with Ethiopia’s obligation to protect and promote freedom of expression, and is particularly problematic given the need for open public communication channels during a global pandemic.²²⁵

3.4.4 Misapplication of Relevant Standards on Limitations

The list of several categories of speech that remain as ‘exceptions’ to the principles proscribed in the Proclamation. These categories of speech include academic or scientific study, news reports and political critique, artistic performance, and religious teaching. Under international human right law, permissible expression is the norm, not the exception.²²⁶

However, under Article 6 of the proclamation protected forms of expressions were exceptions to the limitation. This presents the permissible scope of restriction backward. Article 6(2) provides

²²¹Interview with Mr. Abdu Ali, Director of Online and Foreign Media Monitoring at Ethiopian Broadcast Authority, Addis Ababa, (26 April, 2021)

²²² Article 8(5) of the hate speech law

²²³ Ibid

²²⁴ Ibid

²²⁵ Ibid

²²⁶ Ibid

that speech will not be considered disinformation if “a reasonable effort has been made under the circumstances by the person making the speech to ensure the veracity of the speech or if the speech is more inclined to political commentary and critique instead of being a factual or news report.” This provision gets the relevant international standards backwards.²²⁷

It should not be the burden of speakers to assert why their speech “will not be considered” impermissible.²²⁸ Instead, the active burden is on the Government of Ethiopia to establish, under international law, why any restrictions are legitimate, necessary, and proportionate.

²²⁷ Ibid

²²⁸ Ibid

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

This study has analyzed the level of recognition of the right to freedom of expression under international and regional human right laws and specifically evaluates the level of protection provided under the FDRE constitution. In addition, it provided international standards applying to restrict the right to freedom of expression. In doing so the study identified that according to the three-part test freedom of expression can be only be restricted through legitimate limitations which are provided by the law for the protection of a legitimate aim, which is necessary in a democratic society and proportional.

The study has also analyzed the concept of hate speech including its meaning under international and regional human right laws and theories guided to regulate hate speech. The study identified that there is no binding legal definition of the term ‘hate speech’ under international and regional human right laws. Similarly, the definition of hate speech under the Ethiopian hate speech law is vaguely formulated. Moreover, striking an appropriate balance between regulating hate speech and protecting the right to freedom of expression is a controversial task for law and policy makers.

The study has also found that Article 20(2) of the ICCPR and Article 4(a) of ICERD are the notable legal foundations under international human right laws, which enable States to prohibit legally “any advocacy of national, racial or religious hatred that constitutes incitements to discrimination, hostility or violence.

By doing so, the study has critically analyzed the extent of the problem of hate speech in Ethiopia, the need of legislative measure and constitutional foundations to restrict the problem of hate speech. Indeed, the study concluded that the government of Ethiopia has a legal base to take a legislative measure against the problem of hate speech, particularly based on 20(2) of the ICCPR and Article 4(a) of ICERD and via article 29(5) of the FDRE constitution, since Ethiopia is signatory State of these binding international laws.

Indeed, after critically examine the content of some provisions of Hate Speech law, through relevant international human right laws, which used to restrict the right to freedom of expression and prohibition of hate speech, the study found out that, the Hate Speech law has failed to meet international human right laws applying to limit the right to freedom of expression. Accordingly, first, the definition of the term ‘hate speech’ under the proclamation is broad and vaguely formulated, the proclamation use terms like “advocate”, “promote” and “disseminates”, which are not recognized under International Human Right Laws.

Further, the drafters are failed to take a reference of some international guidelines and principles on the issue, particularly from Rabat Plan of Action and Camden Principles, to define these words. As the result, the excessive vagueness of the proclamation could create the officials at the federal and regional level unbounded discretion to determine whom to investigate and prosecute, leading to an almost certain inconsistency in approach and a potential wave of arbitrary arrests and prosecutions

Second, the proclamation has adopted sever criminal punishments including imprisonment, which are exceptionally allowed under international human right laws. It also failed to consider the severity test thresholds under the Rabat Plan of Action. Moreover, the aggravating punishment for individuals and online groups that have more than 5,000 followers is arbitrary number and unnecessary which is against proportionality and necessity test under article 19 (3) of the ICCPR. The threat of excessive penalties for those with a certain number of followers will serve to target and disproportionately affect the free expression of bloggers, journalists, activists, and human rights defenders.

Third, the proclamation provides a problematic delegated censorship obligation to social-media service providers, accordingly social-media enterprises delegated to suppress hate speech and takedown contents. However, the proclamation is not clear on who provides this notification. There is no authority named, meaning that the platform could be expect to take down any content that an individual or government entity report. Indeed, users have no rights and these short takedown notice is alarmingly present a host of due process concern.

Finally, the obligations imposed on social media service providers under the proclamation due to language and resource limitation is not legally enforceable and feasible.

4.2 Recommendations

In order to address the issue and tackle the problems in this thesis, the following recommendations are suggested:

- The government is recommended to draft directives as per article 8(7) of the proclamation, to help with the implementation of the law, this directive could define some of the terms that are missing in the proclamation and thereby limits its negative implication for the right to freedom of expression. Otherwise, it could go further to threaten people's right and institutionalizing the mass surveillance of social media users in bid to control what information people share online.
- Law enforcement authorities require should draw inspiration from the RPA and the Camden as a framework for deciding whether or not an expression is deemed to be hate speech.
- Specialized training on freedom of expression for public prosecutors and polices should be offered because the criminal justice system is lacking officers specially trained on freedom of expression and hate speech. Hence, an intensive training on freedom of expression should be provided to all regional and federal cities public prosecutors. This helps to protect the criminalization of dissenting opinions.
- The government is recommended to train individuals who take part in the investigation and prosecution of crimes related with social media usage on recent technology based crimes of online media, for to balance the right to freedom of expression on one hand and the impact of social media usage on the other hand
- In order to avoid excessive criminal punishments against individual and online groups that have more than 5,000 followers provided in the proclamation, courts should consider the six-part severity tests thresholds under the RPA, during interpretation of the proclamation.
- The authorities given to the Ethiopia Broadcast Corporation (EBC) is not necessary to be a spectator observing and providing yearly reports. Other than issuing reports to the public and government, the EBC does not appear to have the power to enforce social media platforms to take down content that has deemed harmful.

- Courts should interpret the relevant provisions carefully and narrowly with a view only to tackling of hate speech.
- In addition, the government should work with civil society organizations and companies to gain a deeper understanding of media literacy, education and content moderation.
- Finally, the government should consider the root causes of hate speech to take appropriate measures and steps to address the problem on the ground and also to minimize its negative effect on the right to freedom of expression.

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